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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FRED W. RISTOW; SUSAN M. RISTOW,

Plaintiffs-Appellants,

V. No. 93-1861

SOUTH CAROLINA PORTS AUTHORITY, an agency of the State of South Carolina; THE SS UNKNOWN, an unknown ocean going ship,

Defendants-Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Robert S. Carr, Magistrate Judge. (CA-91-3677-2-2J)

Argued: March 9, 1994

Decided: June 13, 1994

Before WILKINS, Circuit Judge, and SPROUSE and CHAPMAN, Senior Circuit Judges.

Affirmed by published opinion. Senior Judge Sprouse wrote the opinion, in which Judge Wilkins and Senior Judge Chapman joined.

COUNSEL

ARGUED: Leonard William Schulz, Big Bend, Wisconsin, for Appellants. William H. Vaughan, Jr., VAUGHAN & LAWRENCE, P.A., Charleston, South Carolina, for Appellee.

OPINION

SPROUSE, Senior Circuit Judge:

Fred W. Ristow is a long-haul truck driver. On December 20, 1988, he drove a load of steel pipes to the South Carolina State Ports Authority ("Ports Authority") terminal in Charleston, South Carolina. While Ristow was standing atop a bundle of pipes on his truck, a forklift operator employed by the Ports Authority began to lift the truck's cargo. Ristow was forced to jump from the truck and suffered serious injuries. The Ports Authority notified

its insurance carrier, Lloyds of London, of the incident. The Ports Authority and Lloyds retained Carter & Co., a local insurance adjustment firm, to represent their interests. Ristow claims that an employee of Carter & Co. offered him and his wife a $75,000 settlement which they accepted, but Carter & Co. refuses to pay the $75,000.

In December 1990, Ristow and his wife brought suit in federal district court in South Carolina against the Ports Authority,1 asserting federal ju

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1 The Ristows also named the vessel the SS Unknown as a defendant in the complaint. The actual name and registry of this ship, onto which Ristow's cargo was to be loaded, were never identified, and the ship was never served notice of the suit. Accordingly, the SS Unknown was dismissed as a defendant.

risdiction based on diversity of citizenship and admiralty. The Ristows claimed negligence, Fred demanding compensation for his injuries and his wife alleging loss of consortium. They also sued for breach of contract in connection with the $75,000 settlement offer. With the parties' consent, this case was referred to a United States Magistrate pursuant to 28 U.S.C.A. Sec. 636(c) (1993). After briefing and a hearing, the magistrate granted the Ports Authority's motion to dismiss the case on the ground that the Ports Authority was immune from suit under the Eleventh Amendment. The Ristows appeal.

I

The Eleventh Amendment to the United States Constitution provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The plain language of the amendment only provides immunity for suits against "one of the United States." Nearly fifty years ago, however, the Supreme Court stated, "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co. v. Department of Treasury, 332 U.S. 459, 464 (1945). The Supreme Court has subsequently made clear that a suit

against an entity that is an arm of the state may also be barred by the Eleventh Amendment. See e.g., Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

In this case, the Ports Authority maintains that it is a state entity-more particularly, that it is the alter ego of the State of South Carolina. It claims Eleventh Amendment immunity from suit. In Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n, 822 F.2d 456, 457-58 (4th Cir. 1987), we set forth the following four-part, non-exclusive inquiry for determining when an entity is the alter ego of a state for Eleventh Amendment purposes: (1) whether the state treasury will be responsible for paying any judgment that might be awarded; (2) whether the entity exer-

cises a significant degree of autonomy from the state; (3) whether it is involved with local versus statewide concerns; and (4) how the entity is treated as a matter of state law. The existence of Eleventh Amendment immunity is a question of law, and the facts to be considered in applying the Ram Ditta factors to the Ports Authority are undisputed. See United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). We, therefore, consider this immunity issue de novo.

A

The first Ram Ditta factor, the responsibility of the state treasury for the judgment, is generally the most important. This notion stems from the Supreme Court's statement in Ford Motor Co. that the state is the real party in

interest "when the action is in essence one for the recovery of money from the state." Ford Motor Co., 323 U.S. at 464. Here, to determine whether a tort recovery from the Ports Authority would in essence be one from the state, it is important to understand the role of the state treasury in the formation and operation of the Ports Authority. The Ports Authority was created by the State of South Carolina in 1942, and the state's General Assembly appropriated $750,000 in initial capital expenditures and maintenance costs. Annual appropriations of funds continued through 1959. While the Ports Authority no longer receives direct funding for its daily operations from the state, the General Assembly continues to make annual appropriations to pay the principal and in-

terest on the $132,000,000 in general obligation bonds issued over the years to finance capital improvements for the Ports Authority. It is clear that the Ports Authority owes its very existence and current financial position to the state's coffers.

The close relationship has extended beyond the initial formation of the Ports Authority. Under South Carolina law, "[a]ny and all net revenues or earnings not necessary or desirable for operation of [the Ports Authority's] business shall be subject to the further action of the General Assembly." S.C. Code Ann. Sec. 54-3-1020 (Law. Co-op. 1977). Under this authority, the State of South Carolina has withdrawn over $1.5 million in funds from the Ports Authority to the state treasury since

1942. In 1992, the State entered into an agreement with BMW under which the German automaker would construct a manufacturing plant in Spartanburg County. To purchase the land and prepare the site for BMW's use, the state transferred over 40 million from its treasury to the Ports Authority so that the Ports Authority could acquire the land on behalf of the state. The state's withdrawal of excess Ports Authority funds and its commingling of state funds with those of the Ports Authority in transactions like the BMW transaction are a strong indication that the funds of the Ports Authority belong to the state and that a tort recovery out of those funds would constitute one from the state treasury.

Without denying these facts, the Ris-

tows contend nonetheless that numerous other factors support a finding that a recovery in this case would not be paid out of the state treasury. In particular, the appellants rely on Sec. 54-3-140(9) of the South Carolina Code which provides:

> In order to enable it to carry out the purposes of this chapter, the Authority . . . [m]ay apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidence of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall be secured by the faith, credit or taxing power of the State, or any political subdivision thereof[.]

S.C. Code Ann. Sec. 54-3-140(9) (Law.

Co-op. 1977) (emphasis added). The Ristows assert that the phrase "no indebtedness of any kind" means precisely what it says: the State of South Carolina may not be held responsible for any debt, including money owed by the Ports Authority due to a tort recovery against it. Such an interpretation would insulate the state treasury from any payment of a recovery in favor of the Ristows in this case. We are unpersuaded.

The Ristows' view of 54-3-140(9) cannot be squared with the language and structure of the other parts of the South Carolina Code relating to the fiscal prerogatives and responsibilities of the Ports Authority. Subsection (9) solely concerns the power of the Ports Authority to borrow money from agencies of the United States government. Other

statutory provisions enable the Ports Authority to incur debt generally but contain no debt insulation provisions. For example, Sec. 54-3-140(2)2 empowers the Ports Authority to mortgage or lease real and personal property but does not insulate the state from any indebtedness arising from such mortgages or leases, nor does it refer to Sec. 54-3-140(9). Similarly, Sec. 54-3-1010 3 enables the Ports Authority to issue bonds to finance its operations. No language in Sec. 54-3-1010 shields the state from responsibility for funds owed under such debt financing, nor is there any cross-reference to Sec. 54-3-140(9).

The Ristows also make an "insurance"

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2 S.C. Code Ann. Sec. 54-3-140(2) (Law. Co-op. 1977).
3 S.C. Code Ann. Sec. 54-3-1010 (Law. Co-op. 1977).

argument in asserting that the first Ram Ditta factor compels a finding in their favor. They claim that the Ports Authority is covered by a Lloyds of London policy that is large enough to satisfy the $430,000 in damages and costs which they seek. Further, they argue, even should the policy not cover the entire tort judgment, any excess liability would be paid by the Ports Authority, not the state treasury. The Ristows point out that the South Carolina Code does not obligate the General Assembly to appropriate funds for the operation of the Ports Authority nor does it make the state explicitly responsible for judgments against the Ports Authority. The only clear source of money out of which a judgment would be paid is the revenue retained by the Ports Authority

in its bank accounts, see S.C. Code Ann. Sec. 54-3-1020 (Law. Co-op. 1977), or funds bon-owed by the Ports Authority under the authority of Sec. 54-3-1010. This reasoning finds support in the Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F.2d 628, 631-32 (2d Cir. 1989) (absent statutory provisions committing the treasuries of New York or New Jersey to satisfy judgments against the Authority, a judgment could not lead to a depletion of state treasuries), aff'd on other grounds, 495 U.S. 299 (1990) (assuming arguendo that Port Authority is a common agency of New York and New Jersey, it has waived its Eleventh Amendment immunity).

We find persuasive, however, the reasoning of the Third Circuit which, in

considering the identical New York/New Jersey Port Authority, held that the symbiotic relationship between the states and the Port Authority Trans-Hudson Corporation supported a finding of Eleventh Amendment immunity. Port Authority Police Benevolent Ass'n v. Port Authority of New York and New Jersey, 819 F.2d 413 (3d Cir.), cert. denied, 484 U.S. 953 (1987). The Third Circuit found that restrictions on the use of excess revenues to purposes within the Port Authority's statutory mandate were consistent with its holding that the Authority was to be considered an arm of the states of New York and New Jersey. Id. The court also noted, "[T]he states provided the Authority with financial support initially, and then devised a system whereby it could become finan-

cially independent. Appellant sets much store by the financial autonomy of the Authority, arguing that the Authority [therefore] is not a state agency. The appellant is mistaken." Id. at 416. To the contrary, New York's and New Jersey's creation of the Authority's financial structure supported a finding that it shares the states' immunity from suit Id.

We favor this broader and, we think, more practical approach of the Third Circuit over that of the Second Circuit in Feeney, and conclude that the first factor of the Ram Ditta test strongly supports recognition of Eleventh Amendment immunity. Although the South Carolina State Ports Authority now appears to be self-sufficient, it was created through the use of state funds and re-

received annual appropriations from the General Assembly throughout the early years of its existence. Its control over its revenues and borrowing power are substantially circumscribed. True, Sec. 54-3-1020 empowers the Authority to establish bank accounts in which to deposit its funds, but that same section provides that the state is entitled to "any and all net revenues not necessary or desirable for the operation of the business .... " Section 54-3-1010 gives the Ports Authority the ability to issue bonds; however, such borrowing is to be used only for "the acquisition, construction, equipment, maintenance and operation of any facility, building, structure, terminal railroad or any other thing which the Authority is herein authorized to acquire, construct, equip,

maintain or operate ...." Finally, as shown by the BMW transaction, the state has used the treasury of the Ports Authority as a conduit to accomplish the aims of the government of South Carolina.

B

The second inquiry required by Ram Ditta is whether the entity "exercises a significant degree of autonomy from the state." Id., 822 F.2d at 457-58. In Ram Ditta, the court found that the Parks Commission enjoyed considerable autonomy because it was a "body corporate," could sue and be sued in its corporate capacity, could enter into contracts and leases, was managed by a ten-member commission whose members were appointed by county governments, was represented in the proceedings by county attorneys as

opposed to the Maryland Attorney General's office, and derived its operating revenues from county sources. Id. at 458-59.

The Ristows assert that the existence of many of these same factors in this case requires a finding that the Ports Authority is autonomous from the State of South Carolina. It possesses the powers of a body corporate, including the power to sue and be sued and to make contracts. S.C. Code Ann. Sec. 54-3-140(1) (Law. Co-op. 1977). It can purchase and rent real and personal property and may pay all costs and expenses incident to its formation and organization. S.C. Code Ann. Sec. 54-3-140(2), -140(8) (Law. Co-op. 1977). Rather than participate in South Carolina's civil service system, the Ports Authority may

"appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation" of those employees. S.C. Code Ann. Sec. 54-3-140(5) (Law. Co-op. 1977). The Ports Authority is represented in this case by a private law firm, not South Carolina's Attorney General's office.

The Ports Authority responds, however, that it was created as an instrumentality of the State of South Carolina, S.C. Code Ann. Sec. 54-3-130 (Law. Co-op. 1977), and is governed by a seven-member board, "appointed by the Governor, with the advice and consent of the Senate . . . ." S.C. Code Ann. Sec. 54-3-10, -20 (Law. Co-op. 1977). Although it has the powers of a body corporate, the Ports Authority is unlike a traditi-

onal corporation. It has no corporate charter or shareholders, and its board of directors is appointed by public officials. Property of the Ports Authority is not subject to any state taxes or assessments. S.C. Code Ann. Sec. 54-3-1050 (Law. Co-op. 1977). Its employees are eligible for the state's employee retirement system and are subject to the state's workers' compensation plan. The Ports Authority also points out that although its general counsel's law firm was retained by its insurer to represent it in this dispute, there is an assistant State Attorney General assigned to the Ports Authority.

The power to enter into contracts, purchase property, and make unconstrained personnel decisions undoubtedly provides the Ports Authority with con-

siderable control over its day-to-day operations. Such independence, however, does not mean that the Ports Authority is not ultimately beholden to the State of South Carolina. The Ports Authority's board of directors is appointed by the governor with confirmation by the Senate; state law provides it with immunity from property taxes; it was created to serve public ends by the state's General Assembly; and the state enjoys the power to withdraw excess Ports Authority funds for its own use. Although the considerations are certainly mixed, the balance of these factors leads to the conclusion that the Ports Authority ultimately answers to the state and is not, for Eleventh Amendment purposes, an autonomous institution.

C

Likewise, the third Ram Ditta factor supports a finding of Eleventh Amendment immunity from suit. Contrary to the Ristows' position, we have little trouble in concluding that the Ports Authority's functions extend beyond the localized area of the coast to affect all regions of the state. Pursuant to authority granted it under Sec. 54-3-110,4 the Ports Authority provides facilities to enable overland transportation of products to and from South Carolina's ports. It has such facilities in Charleston, Georgetown, Beaufort, and Spartanburg counties. The BMW transaction in Spartanburg County is additional evidence that the Ports Authority's impact can be felt in portions of the

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4 S.C. Code Ann. Sec. 54-3-110 (Law. Co-op. 1977).

state away from the Atlantic Coast.

D

As to the final prong of the Ram Ditta test, there appears to be no clear statement of South Carolina law on this issue. It is true that the Supreme Court of South Carolina in South Carolina Farm Bureau Marketing Ass'n v. South Carolina State Ports Authority, 293 S.E.2d 854 (1982), broadly treated the actions of the Ports Authority as those of the state; however, that court's unstated assumptions cannot be accepted as a definitive statement of whether South Carolina courts view the Ports Authority as the alter ego of the state. On the other hand, the Ristows are unable to point to any state case that would show that the Ports Authority is not to be considered an arm of the state. The

state's view of the status of the Ports Authority is at best inconclusive.

E

Two additional factors influence our decision. First, the federal district courts located in South Carolina have unanimously held that the Ports Authority is entitled to Eleventh Amendment immunity. See, Coakley, No. 2:87-1442-2 (D.S.C. July 18, 1988); South Carolina State Ports Authority v. Seaboard Air Line R. Co., 124 F. Supp. 533 (E.D.S.C. 1954). Second, although the Eleventh Amendment insulates the Ports Authority from suit in federal court, under the South Carolina Tort Claim Act, an agency of the state is liable in tort in the same manner and to the same extent as a private individual under like circumstances, S.C. Code Ann. Sec. 15-78-40

(Law. Co-op. Supp. 1993), and Sec. 15-78-30 5 defines "agency" to include any "authority" of the state. Thus, while retaining Eleventh Amendment immunity, South Carolina has provided a forum in its state courts for claims such as the Ristows'.

We conclude that the South Carolina State Ports Authority is the alter ego of the State of South Carolina and is therefore entitled to Eleventh Amendment immunity from suit.6

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5 S.C. Code Ann. Sec. 15-78-30 (Law. Co-op. Supp. 1993).

6 We therefore need not address the Ristows' argument that the district court had jurisdiction over this case based on diversity of citizenship. "Since neither a state nor its alter ego is a citizen for purposes of diversity jurisdiction, a suit between a state, or its alter ego, and a citizen of another state is not a suit between citizens of different states and diversity jurisdiction does not exist" Harris v. Pennsylvania Turnpike Comm'n. 410 F.2d 1333-34 n.1 (3d Cir. 1969).

II

Alternatively, the Ristows ask us to remand their case to the district court for a determination of whether they have alleged claims founded on admiralty law and whether the Ports Authority has waived its sovereign immunity by entering into this federally regulated area. In Parden v. Terminal R. of Alabama State Docks Dept., 377 U.S. 184, 190 (1964), overruled by, Welch v. Texas Dept. of Highways & Public Transp., 483 U.S. 468 (1987), the Supreme Court would seem to have allowed an action against a state or the alter ego of a state based on the state's adoption and ratification of the Commerce Clause. In Welch, however, the Supreme Court held that "to the extent that Parden v. Terminal Railway is inconsistent with the requirement

that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." Welch, 483 U.S. at 478. In footnote 8 of Welch, the Supreme Court went on to state that it had "no occasion to discuss the validity of the additional holding in Parden, that Congress has the power to abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that States are engaged in interstate commerce." Id. at 478 n.8 (emphasis added).

The Ristows assert that Congress does indeed possess the power to abrogate Eleventh Amendment immunity and has done so in the context of admiralty law. The Supreme Court in Welch, however, explicitly stated that "the Court has held

that the Eleventh Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity."' Id. at 472-73. The Court went on to note: "In Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), eight Members of the Court agreed that the Eleventh Amendment bars suit in admiralty brought to recover damages from the State or its officials." Id. at 473 n.3 (citations omitted). Accordingly, we conclude that a suit for money damages by the Ristows against the Ports Authority grounded in admiralty is likewise barred by the Eleventh Amendment.

III

The decision of the magistrate judge is therefore affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and SUSAN M. RISTOW, his wife,

Plaintiffs,

Civil Action No. 2:91-3677-2J

-versus-

O R D E R

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and the SS Unknown, an unknown ocean going ship,

Defendants.

This personal injury case and controversy is before the undersigned United States Magistrate Judge on consent of the parties to conduct all further proceedings and order the entry of final judgment. 28 U.S.C. Sec. 636(c).

On December 10, 1991, the plaintiffs, proceeding pro se,1 filed this action

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1 The plaintiffs subsequently retained counsel in Wisconsin, their home state, as well as local counsel.

seeking damages for personal injuries sustained by Fred Ristow while he assisted in the unloading of a cargo of steel pipe at the docks operated by defendant South Carolina State Ports Authority (SPA) and for the resulting loss of consortium by his wife, Susan M. Ristow. The plaintiffs assert jurisdiction exists in this court by virtue of diversity of citizenship and admiralty. 28 U.S.C. Secs. 1332, 1333.

On February 3, 1992, the defendant SPA moved to dismiss the action on the ground that the court lacks jurisdiction over the subject matter because SPA is an agency of the State of South Carolina and the action against SPA is in reality an action against the State of South Carolina by a citizen of another state precluded by virtue of the eleventh

amendment to the Constitution of the United States.2

A hearing was convened in Charleston, South Carolina, on July 30, 1992. The parties thoroughly briefed the issues and submitted affidavits in support of their positions. The plaintiff argued that the SPA is not the alter ego or agency of the state and, consequently, is not entitled to eleventh amendment protection, and the defendant took the contrary position.

A review of the record and relevant case law indicates that the defendant's motion is meritorious and this suit is barred by eleventh amendment to the

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2 SPA also asserts that it is not a citizen for purposes of diversity jurisdiction. The court need not reach that argument in light of the merits of the eleventh amendment immunity argument.

United States Constitution.3

The SPA is a state agency of South Carolina, created by an Act of the General Assembly now codified at S.C. Code Ann., Sec. 54-3-10 et. seq. (Law. Co-op. 1976). Accordingly, it has been found to be entitled to raise eleventh amendment immunity and is not a "citizen" subject to diversity jurisdiction. See, South Carolina State Ports Authority v. Seaboard Airline R.R. Co., 124 F.Supp. 533 (D.S.C. 1954); Coakley v. South Carolina State Ports Authority, D.S.C. Case No. 2:87-1442-2 (UP 1988).

The Ristows' complaint states a claim

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3 Amendment 11 - Suits against States
The judicial power of the United States shall not construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

of negligence against the SPA. Tort actions against the State of South Carolina are actionable under the South Carolina Tort Claims Act, S.C. Code Ann., Sec. 15-78-10, et. seq. (Law. Co-op. 1986), in a court of the State of South Carolina. This Act expressly includes state agencies such as SPA and makes clear that the General Assembly intended to exercise immunity from liability in suit except as waived by the Act. S.C. Code Ann., Secs. 15-78-40, 15-78-20(b) (Law. Co-op. 1986).

The defendant, South Carolina State Ports Authority, is entitled to the immunity from suit afforded by the eleventh amendment and jurisdiction over it does not lie in this court. Therefore, its motion to dismiss is granted. Further, as the plaintiffs have not served

the other defendant, the SS Unknown an unknown ocean going ship, within one hundred and twenty (120) days after the complaint was filed, this defendant will be dismissed from the action pursuant to Rule 4(j) of the Federal Rules of civil Procedure, thus ending the entire action.

IT IS SO ORDERED.

/s/ Robert S. Carr
ROBERT S. CARR
UNITED STATES MAGISTRATE JUDGE

Charleston, South Carolina

September 2, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and SUSAN M. RISTOW, his wife,

Plaintiffs,

-vs-

ORDER
Civil Action No.
2:91-3677-2J

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and the SS Unknown, an unknown ocean going ship,

Defendants.

This court issued an Order dated September 2, 1992. By error, the notice appropriate for matters subject to review by a district judge was attached to the Order, and a Notice of Filing appropriate for matters subject to such review was mailed to counsel of record. The Plaintiff filed a document entitled "Plaintiff's Objections to Report, Rec-

ommendations and Order of Magistrate" in accordance with such notices.

This court scheduled a hearing. The defendant South Carolina State Ports Authority offered a factual affidavit. The Plaintiffs advised the court that they intended to appeal. In order to prevent injustice, the court will now treat the "Plaintiff's Objections to Report, Recommendations and Order of Magistrate" as a motion to alter judgment under Rule 59 (e) of the Federal Rules of Civil Procedure and deny such motion. Plaintiffs are advised that this Order is final and is dispositive unless appeal to the Unied States Fourth Circuit Court of Appeals is effected within thirty (30) days after this Order.

The "Plaintiff's Objections to Report, Recomendations and Order of Magistrate,"

treated as a motion to alter judgment under FRCP 59 (e), is denied based upon the same reasons as stated in the September 2, 1992 order.

/s/ Robert S. Carr
Robert S. Carr
United States Magistrate Judge

June 10, 1993
Charleston, South Carolina

AMENDMENT [XI.]

Suits against states

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CHAPTER 3

(Note: Histories and citations omitted)

South Carolina State Ports Authority

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ARTICLE I

CREATION AND ORGANIZATION

SEC.

54-3-10. Creation and membership of State Ports Authority.

54-3-20. Appointment and terms of members; vacancies.

54-3-30. Organization; officers; meetings.
54-3-40. Treasurer.

Sec. 54-3-10. Creation and membership of State Ports Authority.

The South Carolina State Ports Authority is hereby created consisting of a governing body of nine members, hereafter referred to as the Authroty.

Sec. 54-3-20. Appointment and terms of members; vacancies.

The members of the board shall be appointed by the Governor, with the advice and consent of the Senate, for terms of seven years each and until their successors shall have been appointed and have qualified. In the event of a vacancy, however caused, a successor shall be appointed in the manner of original appointment for the unexpired term.

Sec. 54-3-30. Organization; officers; meetings.

They shall elect one of their number

as chairman and one as vice-chairman and shall also elect a secretary. The board shall meet upon the call of its chairman and a majority of its members shall constitute a quorum for the transaction of its business.

54-3-40. Treasurer.

The Authority shall select one of its members to serve as its treasurer. The Authority shall require a surety bond of such appointee in such amount as the Authority may fix and the premium thereon shall be paid by the Authority as a necessary expense of the Authority.

ARTICLE 3

PURPOSES AND POWERS GENERALLY

SEC.

54-3-110. State may improve harbors and seaports through Authority.
54-3-120. Jurisdiction of Authority.
54-3-130. Purposes of Authority.
54-3-140. Powers of Authority.
54-3-150. Acquisition of property.

54-3-160. Powers with respect to certain property.
54-3-170. Use of certain State Property.
54-3-180. Exchange of property; removal of structures.
54-3-190. Lease or grant of property to United States; reimbursing United States for certain acquisition costs.
54-3-200. Acquisition and operation of terminal railroads.
54-3-210. Contracts with railroad employees,
54-3-220. Connecting with or crossing other railroads.
54-3-230. Foreign-trade zones.
54-3-240. Inland ports.
54-3-245. Seafood industrial port in Beaufort County.
54-3-250. Inspection of motor vehicles prior to exportation.

Sec. 54-3-110. State may improve harbors and seaports through Authority.

Through the Authority the State may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors or seaports within the State, namely Charleston, Georgetown and Port Royal, and works of internal improvement incident thereto, including the acquisition or construction, main-

tenance and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

Sec. 54-3-120. Jurisdiction of Authority.

The jurisdiction of the Authority in any of said harbors or seaports within the State shall extend over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flow and shall extend to the edge of the outer bar at such harbors or seaports.

54-3-130. Purposes of Authority.

The Authority is created as an in-

strumentality of the State for the accomplishment of the following general purposes, all or any of them, which are intended to broaden and not to restrict any other powers given to it in this chapter, namely:

(1) To develop and improve the harbors or seaports of Charleston, Georgetown and Port Royal for the handling of water-borne commerce from and to any part of the State and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve such harbors or seaports and their port facilities;

(3) To foster and stimulate the shipment of freight and commerce through such ports, whether

originating within or without the State, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To cooperate with the United States of America, and any agency or any department, corporation or instrumentality thereof in the maintenance, development, improvement and use of such harbors and seaports in connection with and in furtherance of the war operations and needs of the United States;

(5) To accept funds from any of the counties of Beaufort, Charleston or Georgetown, and to use them in such manner, within the pur-

poses of the Authority, as shall be stipulated by the county and to act as agent or instrumentality for any of such counties in any matter coming within the general purposes of the Authority;

(6) To act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(7) To cooperate and act as co-assurer with the city of Augusta, Georgia, and the Georgia State Ports Authority in furtherance of the river development project known as the Savannah River

Project Below Augusta;

(8) To promote, develop, construct, equip, maintain and operate a harbor or harbors within this State on the Savannah River, and in furtherance thereof have all of the powers, purposes and authority given by law to the Authority in reference to the harbors and seaports of Charleston, Georgetown and Port Royal; and

(9) In general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports.

Sec. 54-3-140. Powers of Authority.

In order to enable it to carry out the purposes of this chapter, the Authority:

(1) Shall have the powers of a body corporate, including the power to sue and be sued, to make contracts and to adopt and use a common seal and alter it as may be deemed expedient;

(2) May rent, lease, buy, own, acquire, mortgage and dispose of such property, real or personal, as the Authority may deem proper to carry out the purposes and provisions of this chapter, all or any of them;

(3) May acquire, construct, maintain, equip and operate wharves, docks, ships, piers, quays, elevators, compresses, refrigera-

tion storage plants, warehouses and other structures and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto and the construction of belt line roads and highways and bridges and causeways thereon and other bridges and causeways necessary or useful in connection therewith and shipyards, shipping facilities and transportation facilities incident thereto and useful or convenient for the use thereof, including terminal railroads;

(4) May acquire, construct, maintain, operate and contract to operate in any of said counties

airports, seaplane bases, naval bases and any other facilities necessary or useful in carrying out the purposes of this chapter and of the Authority;

(5) Shall appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation thereof;

(6) Shall establish an office for the transaction of its business in the city of Charleston and such other offices within and without the State as may be deemed by the board to be necessary or useful in carrying out the purposes of this chapter;

(7) May create and operate such

agencies and departments as the board may deem necessary or useful for the furtherance of any of the purposes of this chapter;

(8) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Authority and incident to the administration and operation thereof and all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this chapter;

(9) May apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the

directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof;

(10) May act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any

matter coming within the purposes or powers of the Authority;

(11) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the powers granted to it may be enjoyed and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(12) May do any and all other acts and things in this chapter authorized or required to be done, whether or not included in the general powers in this section

mentioned;

(13) May do any and all things necessary to accomplish the purposes of this chapter; and

(14) May promulgate rules and regulations governing the use of or doing business on the Authority's property or facilities, including the adoption of safety standards and insurance coverage or proof of financial responsibility, and may provide for the licensing of persons, firms or corporations using or doing business on such property or facilities, and for license fees to cover the expense thereof. Licenses may be revoked after notice and hearing by the Authority for wilful breach of or fail-

ure to comply with such rules and regulations.

But the Authority shall not engage in shipbuilding except upon the unanimous vote of its members.

Sec. 54-3-150. Acquisition of property.

For the acquiring of rights-of-way and property necessary for the construction of terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses, and other riparian and littoral terminals and structures and approaches to them and transportation facilities needful for their convenient use and belt line roads and highways, causeways, and bridges and other bridges and causeways, and for the acquiring of

property necessary for the river development project known as the Savannah River Project Below Augusta, and for the acquiring of property necessary for the development of a harbor or harbors within this State on the Savannah River, the Authority may purchase them by negotiation or may condemn them. The power of eminent domain shall apply not only to all property of private persons or corporations but also as to property already devoted to public use.

Sec. 54-3-160. Powers with respect to certain property.

The Authority may exercise in reference to any property, assets, holdings, leases, contracts, rights, franchises or licenses conveyed to it under Section 1 of Act No. 216 of 1945 (Acts 1945, p 365) all of the rights, privileges, pow-

ers, immunities, duties and functions conferred by Secs. 54-5-10, 54-5-60, 54-5-80, 54-5-90 and Secs. 5-35-10 to 5-35-40 upon cities of this State having a population of fifty thousand inhabitants or more and upon port utilities commissions of such cities.

Sec. 54-3-170. Use of certain State property.

The Authority may take, exclusively occupy, use and possess, in so far as may be necessary for carrying out the provisions of this chapter, any areas of land owned by the State and within the counties of Beaufort, Charleston and Georgetown, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the ripar-

ian rights thereto pertaining. When so taken and occupied, due notice of such taking and occupancy having been filed with the Secretary of State, such areas of land are hereby granted to and shall be the property of the Authority. For the purposes of this section, the meaning of the term "use" shall include the removal of material from and the placing of material on any such land. In case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provisions of this section shall continue in full force and effect as to all other lands owned by the State. The provisions of this section are subject to all laws and regulations of the United States with respect to navigable waters.

Sec. 54-3-180. Exchange of property; removal of structures.

The Authority may exchange any property acquired under the authority of this chapter for other property usable in carrying out the powers hereby conferred and also may remove from lands needed for its purposes and reconstruction on other locations, buildings, terminals, railroads or other structures upon the payment of just compensation, if, in its judgment, it is necessary or expedient so to do in order to carry out any of its plans for port development, under the authorization of this chapter.

Sec. 54-3-190. Lease or grant of property to United States; reimbursing United States for certain acquisition costs.

The board of the Authority may assign, transfer, lease, convey, grant or donate to the United States of America, or to the appropriate agency or department

thereof, any or all of the property of the Authority for any use by such grantee for any purpose included within the general purposes of this chapter, as stated in Sec. 54-3-130, such assignment, transfer, lease, conveyance, grant or donation to be upon such terms as the board of the Authority may deem advisable. In the event the United States of America should decide to undertake the acquisition, construction, equipment, maintenance or operation of the airports, seaplane bases, naval bases, wharves, piers, ships, refrigerator storage plants, warehouses, elevators, compresses, docks, shipyards, shipping and transportation facilities before referred to, including terminal railroads, roads, highways, causeways or bridges, and should itself decide to acquire the

lands and properties necessarily needed in connection therewith by condemnation or otherwise, the board of the Authority may transfer and pay over to the United States of America, or to the appropriate agency or department thereof, such of the moneys belonging to the Authority as may be found needed or reasonably required by the United States of America to meet and pay the amount of judgments or condemnnation, including costs, if any be taxed thereon, as may from time to time be rendered against the United States of America, or its appropriate agency, or as may be reasonably necessary to permit and allow the United States of America, or its appropriate agency, to acquire and become possessed of such lands and properties as are reasonably required for the construction

and use of the facilities before referred to.

Sec. 54-3-200. Acquisition and operation of terminal railroads.

The Authority may acquire, own, lease, locate, install, construct, equip, hold, maintain, control and operate at harbors and seaports a line of terminal railroads with necessary sidings, turnouts, spurs, branches, switches, yard tracks, bridges, trestles and causeways and in connection therewith or appurtenant thereto may further lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyance or appliance necessary or proper to carry passengers, goods, wares and merchandise over, along or upon the tracks of such railroads or other conveyances.

Sec. 54-3-210. Contracts with railroad employees.

The Authority may make agreements as to the scale of wages, seniority,and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the operation of the terminal railroads provided for in Sec. 54-3-200 and the service and equipment pertinent thereto. And should the Authority exercise the power herein given then the Authority shall make such agreements with such employees in accordance with the act of Congress known as the Railway Labor Act (USC Title 45, Secs. 151-163) as amended or as hereafter amended to the end that such agreements as to seniority and working conditions will obtain as to such employees and the standard rate of pay be provided as is in

force relative to like employees of interstate railroads operating in the same territory with the terminal railroads authorized hereby.

Sec. 54-3-220. Connecting with or crossing other railroads.

The Authority may with its terminal railroads connect with or cross any other railroad upon the payment of just compensation and receive, deliver to and transport the freight, passengers and cars of common carrier railroads as though it were an ordinary common carrier.

Sec. 54-3-230. Foreign-trade zones.

The South Carolina State Ports Authority is authorized to make application to the Foreign-Trade Zones Board for the purpose of establishing, operating, and maintaining foreign-trade zones in the

State, under the act of Congress known as the Foreign-Trade Zones Act which provides for the establishment, operation and maintenance of foreign-trade zones in the United States.

The South Carolina State Ports Authority shall select and describe the location of the zones for which application may be made and shall make such rules and regulations concerning the operation, maintenance and policing of them as may be necessary to insure compliance with the Foreign-Trade Zones Act and for other appropriate purposes.

The South Carolina State Ports Authority shall have full power and authority to erect, maintain and operate or lease any structures or buildings or enclosures as may be necessary or proper for the establishing, operating, and main-

taining of any such foreign-trade zones in the State of South Carolina.

The authority granted to The South Carolina State Ports Authority confers the right and duty and power to do all things necessary and proper to achieve compliance with the Foreign-Trade Zone Act and to carry into effect establishing, operating and maintaining of foreign-trade zones within the State.

Sec. 54-3-240. Inland ports.

The South Carolina State Ports Authority is authorized to establish inland ports to provide services for the handling of general merchandise cargo; provided, however, that no such inland port shall be established unless it is designated as a United States Port of Entry by the United States Custom Service. The State Ports Authority shall select and

describe the location of any such inland port and may erect, maintain and operate or lease any structure, building or enclosure as may be necessary for the establishment, operation and maintenance of any such port. The Authority shall make such rules and regulations and do such other things as may be necessary to carry out the purposes of this section.

Sec. 54-3-245. Seafood industrial port in Beaufort County.

In addition to the powers granted previously to the State Ports Authority, the Authority may construct, equip and operate a seafood-industrial port in Beaufort County or it may contract with any agency or political subdivision of the State of South Carolina for any or all of these purposes.

Sec. 54-3-250. Inspection of motor vehicles prior to exportation.

No motor vehicle shall be exported to another country through the State Ports, Authority unless the Authority has inspected the vehicle and determines that it is the same vehicle described on the documents required to be filed concerning the exportation of such vehicle.

ARTICLE 5

SUPERVISION OF WHARVES, WAREHOUSES AND OTHER FACILITIES

SEC.

54-3-410. Authority shall have general supervision of wharves, warehouses and terminal facilities.
54-3-420. Examination of facilities.
54-3-430. Requiring repair or improvement of facilities.
54-3-440. Authority may order improvements to facilities on petition.
54-3-450. Unsafe or unsuitable facilities.
54-3-460. Penalties for violations of rules and regulations.
54-3-470. Appeals.
54-3-480. Article inapplicable to portions of Charleston County.

Sec. 54-3-410. Authority shall have general supervision of wharves, warehouses and terminal facilities.

The Authority shall have general supervision in the port of Charleston of all wharves, warehouses and terminal facilities of all transmitting and transporting corporations and of all wharves, warehouses and terminal facilities of persons engaged in business as public warehousemen or wharfingers and shall examine them and keep itself informed as to their condition and the manner in which they are operated, with reference to the security and accommodation of the public and the compliance with all provisions of law applicable thereto.

Sec. 54-3-420. Examination of facilities.

The Authority may examine into all wharves, warehouses and terminal facilities, and the approaches thereto in

Charleston County.

Sec. 54-3-430. Requiring repair or improvement of facilities.

Whenever in the judgment of the Authority it shall appear that repairs are necessary upon any such wharves, warehouses or terminal facilities or that any additions, improvements or enlargements in such wharves, warehouses or terminal facilities or any change in the mode of operating and constructing such business is reasonable and expedient in order to promote the security, convenience and accomodation of the public or to provide facilities required by the business offering at the port of Charleston, the Authority shall give information in writing to the owners or operators of such wharves, warehouses and terminal facilities of the improve-

ments, changes, enlargements and betterments which it judges to be proper and if the owners or operators of such wharves, warehouses and terminal facilities shall fail within sixty days to adopt the suggestion of the Authority, the Authority shall take such legal proceedings as it may deem expedient.

Sec. 54-3-440. Authority may order improvements to facilities on petition.

Upon the written petition of the city council of Charleston or of any of the patrons of any person owning or operating a wharf, warehouse or terminal facility for public uses or for hire, alleging that the plant or equipment in Charleston County of such person is inadequate or unsuited to the public need, the Authority shall fix a time and place for a hearing upon such petition and shall mail notice thereof to the parties

in interest and give due public notice thereof at least one week prior to such hearing. Upon such hearing the Authority may, if it finds the wharf, warehouse or terminal facility to be inadequate or unsuited to the public need, order and prescribe such wharf, warehouse or terminal facility as shall be adequate and suitable and fix a time within which such person owning or operating the same shall construct such additions or improvements. Such person shall thereupon construct such additions or improvements to its plant or equipment within the time so fixed.

Sec. 54-3-450. Unsafe or unsuitable facilities.

The owners or occupiers of any wharf, warehouse or terminal facility within Charleston County shall at all times, as

long as such is used for public purposes, keep it and the sheds thereon and the approaches thereto in proper condition and repair. If such wharf, warehouse, terminal facility, superstructures or the approaches thereto are dangerous to life or limb or unsafe or unsuitable for the persons using them, the Authority shall notify in writing the owner or occupier of such wharf, warehouse or terminal facility to put it in proper repair or condition. If the owner or occupier shall neglect or refuse to put such wharf, warehouse, terminal facility, superstructures or approaches in proper condition within thirty days after notice, such owner or occupier so offending shall be subject to a penalty of one hundred dollars and the further sum of ten dollars for each day such ne-

glect shall continue and shall moreover pay all expense incurred by reason of such neglect or refusal. And if such wharf, warehouse or terminal facility be at such time used for public purposes, the Authority may repair and put it in safe and suitable condition at the expense of the owner or occupier. But the owner or occupier of any such property shall, within ten days after notice is served upon him to repair the same, have the right to apply to the Authority for a hearing.

Sec. 54-3-460. Penalties for violations of rules and regulations.

If any person having a wharf, warehouse or terminal facility used for public purposes in Charleston County shall be guilty of a violation of the rules and regulations provided and prescribed by the Authority, such person owning or

operating such wharf, warehouse or terminal facility shall incur a penalty for each offense of not less than one hundred dollars nor more than three hundred dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall be in any court of competent jurisdiction in the State where such violation has occurred or wrong has been perpetrated.

Sec. 54-3-470. Appeals.

Any such person may appeal from any order, ruling or requirement of the Authority under this article to the court of common pleas for Charleston County, to be heard and determined by the presiding judge thereof as if tried de novo before him. The judge shall pass upon and determine the reasonableness of such order, ruling or requirement and such

appeal shall stay the execution of any order, ruling or requirement appealed from. No fines or penalties imposed by the Authority shall be operative or commence to run until the final determination of such appeal.

Sec. 54-3-480. Article inapplicable to portions of Charleston County.

The provisions of this article shall not apply to any portion of Charleston County not included in the city of Charleston or in the portion of the county lying to the north of said city and between the Ashley and Cooper Rivers.

ARTICLE 7

ERECTION, REPAIRS AND REMOVAL OF WHARVES, DOCKS AND OTHER STRUCTURES

SEC.

54-3-610. Powers of Authority as to erection or removal of wharves, docks, and other structures.

54-3-620. Permit for construction of wharf or other obstruction.
54-3-630. Penalty for building wharves or other obstructions beyond limits without authority.
54-3-640. Duties of Authority as to repair of docks; owners liable for neglect.
54-3-650. Authority shall prosecute for fines and penalties.

Sec. 54-3-610. Powers of Authority as to erection or removal of wharves, docks and other structures.

The Authority may fix the lines along the bay and harbor of Charleston and the rivers and creeks flowing therein within which riparian owners may erect wharves, docks and other proper erections and fixtures for commercial, manufacturing or any other purposes. The Authority may cause the removal of any wharf, dock, wreck or other structure that may obstruct navigation or that may, in its opinion, be injurious to said bay, harbor, rivers or creeks, at the expense of the owner or the person causing the ob-

structions. But the rights of any owner of a wharf whose lines have heretofore been fixed by grant or by authority of State legislation are in no wise to be disturbed.

54-3-620. Permit for construction of wharf or other obstruction.

No person shall build or extend any wharf or other obstruction in or upon the waters of the bay or harbor of Charleston or the rivers or creeks flowing therein without first obtaining, in writing, from the Authority a permit for so doing, except when the lines of such wharf have been fixed by any grant or by authority of State legislation, under a penalty of twenty dollars for every day such wharf or obstruction shall remain.

Sec. 54-3-630. Penalty for building wharves or other obstructions beyond limits without authority.

No person shall build any wharf or other obstruction beyond the lines so fixed by the Authority except when the lines of such wharf have heretofore been fixed by grant or by authority of State legislation. Any person so doing shall pay the sum of twenty dollars for every such offense and shall moreover be fined in the sum of twenty dollars for every day such wharf or other obstruction shall remain.

Sec. 54-3-640. Duties of Authority as to repair of docks; owners liable for neglect.

The Authority shall examine, or cause to be examined, all the docks, public or private, upon the waters of Charleston bay and harbor and the rivers and creeks flowing therein. When it is the opinion of the Authority that any such dock is not in a proper condition for the pur-

poses for which it was designed and used, it shall cause a notice to be served upon the owner or occupier of such dock and he shall deepen such dock and if such owner or occupier shall neglect or refuse to attend to such dock after thirty days' notice, such person so offending shall forfeit and pay twenty dollars and the further sum of five dollars for every day he shall so neglect or refuse and shall, moreover, pay all expenses incurred by reason of such neglect or refusal.

Sec. 54-3-650. Authority shall prosecute for fines and penalties.

The Authority shall prosecute for fines and penalties under Secs. 54-3-610 to 54-3-640.

ARTICLE 9

PARTICULAR POWERS AS TO HARBOR AND BAY OF CHARLESTON

SEC.
54-3-810. Jurisdiction and powers of Authority over harbor and bay of Charleston.
54-3-820. Deposit of excavated material.
54-3-830. Harbor master and port wardens.
54-3-840. Fees and harbor or port charges.
54-3-850. Payment and disbursement of fees, harbor or port charges, fines and penalties.
54-3-860. Authority shall report annually to General Assembly.

Sec. 54-3-810. Jurisdiction and powers of Authority over harbor and bay of Charleston.

The South Carolina State Ports Authority shall have jurisdiction over the harbor and bay of Charleston and the rivers and creeks flowing therein, may preserve peace and good order in said bay and harbor and shall make such regulations as it may see fit, not repugnant to the laws of the land, for the regulation and government of vessels entering said port and waters so as to provide

for their safe and convenient use thereof and for the protection and preservation of said bay, harbor, rivers and creeks from injury by means of deposit of ballast and other materials, the creation of obstructions or for any other cause whatsoever, with authority to prescribe such penalties for the violation of such regulations as it may deem adequate; provided, that such penalty shall not exceed the sum of five hundred dollars for each offense, together with the expense of removing such obstructions or interferences with navigation. The solicitor of the circuit shall enforce such penalties upon the information and at the request of the Authority.

Sec. 54-3-820. Deposit of excavated material.

When any dredging or excavation shall

be done in said bay and harbor or rivers and creeks or the docks thereon, the material excavated shall be deposited only at such place or places as may be designated by the Authority, under such penalty not exceeding the amount prescribed in Sec. 54-3-810, as the Authority shall prescribe. The Authority shall prosecute for fines and penalties under this section.

Sec. 54-3-830. Harbor master and port wardens.

The Authority may elect or appoint annually a harbor master and such number of port wardens as in its discretion is necessary for the bay and harbor of Charleston and the rivers and creeks flowing therein and may define and assign the duties of such harbor master and port wardens under the rules and

regulations for the government of vessels within or entering into said harbor and waters, or any of them, and for their safe and convenient use of said waters and may regulate their compensation, with power to remove them, or any of them, at its discretion.

Sec. 54-3-840. Fees and harbor or port charges.

The Authority may levy and collect from all vessels entering into and using the port of Charleston such fees and harbor or port charges, not inconsistent with the law, as in its discretion, may be necessary to pay the harbor master and port wardens for the services required of them and to defray the necessary expenses attendant upon the execution of the duties devolved upon it under this article in relation to the regulations for the safety and convenience

of vessels entering said port and waters, or any of them.

Sec. 54-3-850. Payment and disbursement of fees, harbor or port charges, fines and penalties.

All fees, harbor or port charges, fines and penalties collected under the provisions of this article shall be paid over to the Authority and be disbursed by it in paying the salaries of the harbor master and port wardens and such other officers as it may see fit to appoint to facilitate the discharge of the duties imposed by this article and such other expenses as may be incident to such duties. At the end of each fiscal year it shall keep on hand the sum of five thousand dollars as an operating fund, and shall turn over all funds in excess of five thousand dollars to the State port construction fund.

Sec. 54-3-860. Authority shall report annually to General Assembly.

The Authority shall annually report to the General Assembly the amounts received for fees, harbor or port charges, fines and penalties and the disbursement thereof and also generally its acts and doings under this article.

ARTICLE 11

FINANCIAL MATTERS

SEC.
54-3-1010. Issuance of bonds.
54-3-1020. Disbursement of funds; surplus.
54-3-1030. State port construction fund.
54-3-1040. Annual financial statement.
54-3-1050. Property of Authority exempt from taxation.

Sec. 54-3-1010. Issuance of bonds.

As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building structure, terminal railroad or any oth-

er matter or thing which the Authority is herein authorized to acquire, construct, equip, maintain or operate, all or any of them, the Authority may issue bonds, payable both as to principal and interest from the revenues to be derived from the operation of all or any part of its properties and facilities, and the powers and authority granted to counties, cities, school districts and other political subdivisions of the State are hereby extended to and made available to the Authority. All revenue bonds issued by the Authority to obtain funds for the acquisition, construction, equipment, maintenance and operation or its properties and facilities shall be issued in accordance with the provisions of Secs. 6-21-10 to 6-21-570 and all conditions, restrictions and limitations imposed by

said Secs. 6-21-10 to 6-21-570 as amended, shall be observed by the Authority in the issuance of such bonds, except as follows:

(1) A pledge of the net revenues derived from the operation of its properties and facilities, all or any of them, rather than its gross revenues, may be made; and

(2) Free service may, in the discretion of the Authority, be afforded to the United States of America, or any agency, department, corporation or instrumentality thereof, by any property or facility of the Authority to acquire, construct, equip, maintain and operate which funds were obtained from the revenue bonds purchased and held by a

Federal agency, provided such free service is with the consent and at the request of the Federal agency then holding the whole of such revenue bonds.

Sec. 54-3-1020. Disbursement of funds; surplus.

All funds of the Authority shall be deposited in a bank or banks to be designated by the Authority. Funds of the Authority shall be paid out only upon warrants signed by the treasurer of the Authority and countersigned by the chairman or the acting chairman. No warrants shall be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this chapter and only when the account or expenditure for which they are to be given in payment has been audited and approved

by the Authority. Any and all net revenues or earnings not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly.

Sec. 54-3-1030. State port construction fund.

The Authority may accept contributions from all persons for the construction and equipping of port facilities and improvements in the ports of the State, and shall place all such contributions in a separate fund to be known as "the State port construction fund," and shall use such fund only for the purpose of engineering, constructing and equipping new port facilities and improving and enlarging existing port facilities.

Sec. 54-3-1040. Annual financial statement.

At least once in each year the Author-

ity shall publish once in some newspaper, published in Charleston County a complete detailed, statement of all moneys received and disbursed by the Authority during the preceding year. Such statement shall also show the several sources from which such funds were received and the balance on hand at the time of publishing the statement and shall show the complete financial condition of the Authority.

Sec. 54-3-1050. Property of Authority exempt from taxation.

The property of the Authority shall not be subject to any taxes or assessments thereon.

D1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and
SUSAN M. RISTOW, his wife,

Plaintiffs,

COMPLAINT AND JURY DEMAND

-vs-

Case No. 2:91-3677-2

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and THE SS UNKNOWN, an unknown ocean going ship,

Defendants.

NOW COMES the plaintiffs, Fred W. Ristow and Susan M. Ristow, pro se, and as and for their Complaint and claims for relief against the above-named defendants state as follows:

Jurisdiction

1. Federal jurisdiction is based on diversity of citizenship, 28 U.S.C. SS1332(a), in that this is a civil ac-

tion in which the plaintiffs are citizens of the State of Wisconsin, the defendant, South Carolina State Port Authority, is an agency of the State of South Carolina, and the defendant, The SS Unknown, is an unknown ocean going ship whose country of registry is unknown and whose home port or principal place of business is unknown but, upon information and belief, is not within the State of Wisconsin.

The matter in controversy exceeds the sum of $50,000.00, exclusive of interest and costs.

2. Federal jurisdiction is also based on admiralty 28 U.S.C. SS1333, in that this is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears.

Venue

3. This is a civil action where federal jurisdiction is founded on both diversity of citizenship and admiralty. The acts, events, and omissions giving rise to the injuries and claims herein occurred within District of South Carolina, Charleston Division. Venue in the United States District Court for the District of South Carolina, Charleston Division, is therefore proper, pursuant to 28 U.S.C. SS 1391 (b)

The Named Plaintiffs

4. Fred W. Ristow is an adult individual and a citizen of the United States and the State of Wisconsin who resides at W227 S8915 St. Joseph's Drive in the Village of Big Bend, County of Waukesha, and State of Wisconsin. The occupation of the said Fred W. Ristow is that of a truck driver.

5. Susan M. Ristow is an adult individual and a citizen of the United States and the State of Wisconsin who resides at W227 S8915 St. Joseph's Drive in the Village of Big Bend, County of Waukesha, and The State of Wisconsin. The occupation of the said Susan M. Ristow is that of a housewife. The said Susan M. Ristow is the wife of the plaintiff, Fred W. Ristow, and was the wife of the said Fred W. Ristow on December 20, 1988 and at all other times material to this Complaint.

Defendants

6. The defendant, South Carolina State Ports Authority, is upon information and belief, an agency of the State of South Carolina organized and existing under and by virtue of the laws of the State of South Carolina. The said South

Carolina State Ports Authority is, upon information and belief, engaged in the business of managing the ports and harbors lying within the State of South Carolina and overseeing and managing on behalf of the State of South Carolina all operations with respect to such ports and harbors. That, upon information and belief, the principal place of business of the defendant, South Carolina State Ports Authority, is located in the City of Charleston, County of Charleston, State of South Carolina, and said defendant has a mailing address of Post Office Box 817, Charleston, South Carolina 29402.

7. The defendant, The SS Unknown, is an ocean going ship whose identity, registry, home port, and principal place of business are unknown. That despite due

and diligent inquiry of the defendant, South Carolina State Ports Authority, by the plaintiffs, the plaintiffs were unable to obtain any information with respect to the identity, registry, home port, and principal place of business of the defendant, The SS Unknown. That, upon information and belief, the defendant, The SS Unknown, was, on December 20, 1988 and at all other times material to the Complaint, engaged in the business of transporting various goods and materials to and from various locations in the world.

8. That, upon information and belief, the defendant, South Carolina State Ports Authority, was, on December 20, 1988 and at all, other times material to this Complaint, acting as an agent for and on behalf of the defendant, The SS

Unknown.

First Claim For Relief

(Claim of Fred W. Ristow Against Defendants For Ordinary Negligence)

As and for their first claim for relief, the plaintiffs allege as follows:

9. On December 20, 1988 and at all other times material to this Complaint, the plaintiff, Fred W. Ristow was employed as a long haul truck driver and longshoreman by Donald Fanetti, d/b/a Donald Fanetti Trucking, who has his principal place of business located in the City of Franklin, County of Milwaukee, and State of Wisconsin at 6701 W. Ryan Road therein. That, on December 20, 1988 and at all other times material to this Complaint, the said Donald Fanetti was engaged in the business of transporting various goods and materials by

truck to and from various locations throughout the United States and in the business of loading and unloading such goods and materials at their respective points of pick up and delivery.

10. That immediately prior to and on December 20, 1988, while in the course of his employment with Donald Fanetti, the plaintiff, Fred W. Ristow, transported by semi-truck and flat bed trailer a load of steel pipe from the State of Wisconsin to a location within the City of Charleston, County of Charleston, State of South Carolina immediately adjacent to the Atlantic Ocean,, which location upon information and belief, was owned, operated, and managed by the defendant, South Carolina State Authority, and is hereinafter referred to as the "terminal."

11. That upon arriving at the terminal on December 20, 1988, the plaintiff, Fred W. Ristow drove the truck he was operating onto the terminal premises and to a location on said premises at which his cargo of pipe was to be unloaded by employees of the defendant, South Carolina State Ports Authority, and himself.

12. That, upon information and belief, the defendant, The SS Unknown, was to arrive at the terminal on a later date, pick up the load of pipe the plaintiff, Fred W. Ristow, had transported to the terminal, and transport such pipe to a location within the Country of Venezuela.

13. That the pipe transported by the plaintiff, Fred W. Ristow, was organized on the flat bed trailer in the following manner: there were five bundles of pipe

laying on the trailer with each bundle containing four individual pipes.

14. That on December 20, 1988, an unknown employee of the defendant, South Carolina State Ports Authority, was assigned by the said South Carolina State Ports Authority to operate a fork lift truck to unload the pipe from the truck operated by the plaintiff, Fred W. Ristow. The said unknown employee assigned to operate the fork lift on that occasion is hereinafter referred to as the "fork lift driver."

15. That on December 20, 1988, while the plaintiff Fred W. Ristow, was standing on top of a load of pipe on the trailer and assisting in the unloading process, the fork lift driver, with said plaintiff in plain view, negligently picked up the entire load of five bun-

dles of pipe with the fork lift, lost control of said load while traveling in the direction of said plaintiff, and dropped one bundle of pipe thus presenting said plaintiff with an emergency and causing him to jump from truck to avoid fatal injury. That as he jumped, plaintiff was struck in the lower left leg, left ankle, left heel, and left foot by the falling pipe. That as a result of the aforementioned incident, the plaintiff, Fred W. Ristow, sustained severe, traumatic, and disabling injuries which well be described hereafter.

16. That at said time and place, the fork lift driver was negligent in the following respects:

a. In attempting to lift too great a load of pipe with the fork lift he was operating;

b. In failing to properly manage and control both the forklift he was operating and the load of pipe he was attempting to lift;

c. In failing to maintain a proper lookout for the plaintiff, Fred W. Ristow;

d. In failing to exercise due care and caution for the safety of the plaintiff, Fred W. Ristow.

17. That all of the acts and omissions of the fork lift driver constitute the direct, efficient, and proximate cause of the injuries sustained by the plaintiff, Fred W. Ristow.

18. That the plaintiff, Fred W. Ristow, suffered severe, traumatic, and disabling injuries consisting, among other things, of a severe comminuted fracture of the left os calcis (heel)

abrasions, contusions, and discoloration to the lower left leg, left ankle, and left foot, fractures of the left foot and left ankle, destroyed left subtalar joint with significant injury to the calcaneal cuboid joint, and possible dislocations in the left lower extremity. The plaintiff, Fred W Ristow, was required to obtain medical care, comfort, and treatment and was eventually required to undergo a surgical procedure known as a left foot triple arthrodesis with iliac crest bone graft. This plaintiff was incapacitated from work for a period of one and one-half years and has had difficulties in performing the normal duties in life. This plaintiff was for a period of time unable to partake of the joys of life and social activities. This plaintiff verily believes

that the injuries to his left ankle, left heel, and left foot are permanent in nature and that he has suffered permanent, partial disability in the use of his left lower extremity. This plaintiff verily believes that his capacity to enjoy life in the future and his capacity to earn a living in the future have been impaired. This plaintiff has suffered excruciating pain, suffering, and distress in the past and verily believes he will suffer pain, suffering and distress in the future. This plaintiff has suffered economic losses in the past which have been projected in excess of $70,000.00 and verily believes he will suffer economic losses in the future which have been projected in excess of $100,000.00. This plaintiff verily believes he will be required to obtain

medical care, comfort, and treatment for his injuries in the future. As a result of these injuries, this plaintiff estimates he has sustained total damages in excess of $400,000.00.

19. That the defendant, South Carolina State Ports Authority, is vicariously liable, pursuant to the applicable law, for the negligence of its employee fork-lift driver under the doctrines of respondeat superior and agency.

20. That the defendant, The SS Unknown, is also vicariously liable, pursuant to the applicable law, for the negligence of the fork lift driver under the doctrines of respondeat superior and agency.

21. That any governmental tort claim filing requirements under the laws of South Carolina have been waived herein

because of actual notice of this incident and injury to the defendant, South Carolina State Ports Authority, and said defendant's acknowledgment of the occurrence of such incident and injury.

22. That the defendant, South Carolina State Ports Authority, is estopped from raising any governmental tort claim filing requirement and any special governmental tort claim statute of limitations under the laws of South Carolina as defenses herein because of the conduct of its insurance adjustor from Crawford and Company which is described in paragraphs 26 through 34 of this Complaint.

Second Claim For Relief

(Claim of Susan M. Ristow Against Defendants For Losss of Consortium)

23. As and for their second claim for

relief, the plaintiffs reallege all of the allegations contained in paragraph 1 through 22 of this complaint and incorporate the same by reference as though specifically set forth at length herein.

24. The plaintiff, Susan M. Ristow, is the wife of the plaintiff, Fred W. Ristow, and as such she is entitled to his companionship, society, support, health, aid, and consortium.

25. That because of the negligence of the defendants, the plaintiff, Susan M. Ristow, was deprived of companionship, society, support, health, aid, consortium, and services all to her damage in the estimated amount of $10,000.00. That the plaintiff, Susan M. Ristow, verily believes she will sustain a partial loss of these same services, support, comfort, and aid in the future all to her

damage in the estimated amount of $20,000.00.

Third Claim For Relief

(Claim of Both Plaintiffs For Breach of Contract Against South Carolina State Ports Authority)

26. As and for their third claim for relief, the plaintiffs reallege all of the allegations contained in paragraphs 1 through 25 of this Complaint and incorporate the same by reference as though specifically set forth at length herein.

27. That at some point after incident and injuries to the plaintiff, Fred W. Ristow, occurred, the defendant, South Carolina State Ports Authority, advised its insurance carrier, Lloyds of London Insurance Company, of the occurrence of said incident and injuries and an insur-

ance adjustment company, Crawford and Company, of Charleston, South Carolina was retained by the South Carolina State Ports Authorityand its insurance carrier to represent said defendant and its insurance carrier with respect to the plaintiffs' claims.

28. That an employee by the name of Lee Pittillo was assigned by Crawford and Company to handle this matter. That at some point subsequent to December 20, 1988, the plaintiffs were so advised of the involvement and representation by Crawford and Company with respect to their claims.

29. That on a date in the summer of 1990, the plaintiffs had a telephone conversation with Lee Pittillo during which Lee Pittillo offered to settle the plaintiffs' claims against the defend-

ant, South Carolina State Ports Authority, for the sum of $75,000.00.

30. That, upon information and belief, Lee Pittillo was duly authorized by the defendant, South Carolina State Ports Authority, and its insurance carrier to make the above-stated settlement offer to the plaintiffs.

31. That the plaintiffs subsequently accepted this oral settlement offer and a binding oral contract for the settlement of the plaintiffs' claims accordingly existed between the parties. That the plaintiffs anticipated receiving, within a reasonable time, a check in the amount of $75,000.00 from either the defendant, South Carolina State Ports Authority, its insurance carrier, or Crawford and Company, along with an appropriate written statement agreement and

release documentations.

32. That as of this date no check or settlement documentation has been received by the plaintiffs from either the defendant, South Carolina State Ports Authority, its insurance carrier, or Crawford and Company.

33. That the defendant, South Carolina State Ports Authority, has accordingly breached its oral contract for the settlement of the plaintiffs' claims which was entered into by its duly authorized representative by failing to forward a check to the plaintiffs for the settlement amount accompanied by the appropriate settlement documentation. Such action also constitutes bad faith on the defendant's part.

34. That as a result of this breach of contract, the plaintiffs have been

damaged in the amount of $75,000.00.

WHEREFORE, the plaintiffs demand judgment against the defendants as follows:

A. For the sum of Four Hundred Thousand Dollars ($400,000.00) in favor of the plaintiff, Fred W. Ristow, against the defendants, South Carolina State Ports Authority and The SS Unknown, and each of them, with respect to the First Claim for Relief set forth in this Complaint;

B. For the sum of Thirty Thousand Dollars ($30,000.00) in favor of the plaintiff, Susan M. Ristow, against the defendants, South Carolina State Ports Authority and The SS Unknown, and each of them, with respect to the Second Claim

for Relief set forth in this Complaint;

C. For the sum of Seventy-Five Thousand Dollars (75,000.00) in favor of the plaintiffs, Fred W. Ristow and Susan M. Ristow, against the defendant, South Carolina State Ports Authority, with respect to the third Claim for Relief set forth in this Complaint;

D. For costs, disbursements, and attorney's fees of this action;

E. For such other and further relief as to the Court may seem just and equitable.

Dated at Big Bend, Wisconsin, this 7th day of December, 1991.

/s/ Fred W. Ristow
Fred W.Ristow, Plaintiff Pro Se

/s/ Susan M. Ristow
Susan M. Ristow, Plaintiff Pro Se

Plaintiffs' Address:

W227 W8915 St. Joseph's Drive
Big Bend, Wisconsin 53103

Telephone: (414) 662-2774

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Jury Demand

The plaintiffs hereby demand trial by a jury of twelve in conjunction with this action as provided by Rule 38 of the Federal Rules of Civil Procedure.

Dated at Big Bend, Wisconsin this 7th day of December, 1991.

/s/ Fred W. Ristow
Fred W. Ristow,Plaintiff Pro Se

/s/ Susan M. Ristow
Susan M. Ristow,Plaintiff Pro Se

Plaintiffs' Address:

W227 S8915 St. Joseph's Drive
Big Bend, Wisconsin 53103

Telephone: (414) 662-2774

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Verification

Fred W. Ristow, having first been duly sworn on oath, deposes and states that he is one of the Plaintiffs in this action and that he has read the foregoing Complaint, and that to the best of his knowledge, information and belief, the facts set forth therein are true and correct.

/s/ Fred W. Ristow
Fred W. Ristow

Subscribed and sworn to before me
this 7th day of December, 1991.

/s/ Leonard W. Schulz
Notary Public State of Wisconsin
My Commission: is permanent

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Verification

Susan M. Ristow, having first been duly sworn on oath, deposes and states that she is one of the Plaintiffs in this action and that she has read the foregoing Complaint, and that to the best of her knowledge, information and belief, the facts set forth therein are true and correct.

/s/ Susan M. Ristow
Susan M. Ristow

Subscribed and sworn to before me
this 7th day of December 1991.

/s/ Leonard W. Schulz
Notary Public, State of Wisconsin
My Commission: is permanent

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
Charleston Division

FRED W. RISTOW AND SUSAN M. RISTOW, his wife,

Plaintiffs,

VS.

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and The SS Unknown, an unknown ocean going ship,

Defendants.

CASE NO.: 2:91-3677-2

MOTION TO DISMISS

The Defendant South Carolina State Ports Authority moves the Court to dismiss the action on the ground that the Court lacks jurisdiction over the subject matter as follows:

1. The Defendant South Carolina State Ports Authority alleges and shows and the Plaintiff acknowledged in its Complaint that Defendant is an agency of the State of South Carolina and is completely identified with said State in

the performance of its public functions, that this action against the Defendant South Carolina State Ports Authority is really an action against the State of South Carolina by a citizen of another state, and that this Court does not have jurisdiction over the subject matter of claim against said state because of the Eleventh Amendment to the Constitution of the United States which provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

The sole relief of Plaintiffs against the Defendant is a claim under the South Carolina Tort Claims Act in the State Court.

2. The Defendant South Carolina State Ports Authority is not a citizen for purposes of diversity jurisdiction.

3. The Complaint alleges only land-side torts and actions, and therefore fails to state a claim in admiralty jurisdiction.

VAUGHAN & LAWRENCE, P.A.

By: /s/ Philip L. Lawrence
Philip L Lawrence
23 Broad Street Street
Post Office Box 1559
Charleston, SC 29402
(803) 723-3020
ATTORNEYS FOR DEFENDANT SOUTH CAROLINA STATE PORTS AUTHORITY

February 3, 1992

Charleston, South Carolina

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW AND SUSAN M. RISTOW, his wife,

Plaintiffs,

AFFIDAVIT

VS.

Case No.: 2:91-3677-2

SOUTH CAROLINA STATE FORTS AUTHORITY, and agency of the State of South Carolina, and THE SS UNKNOWN, an unknown ocean going ship,

Defendants.

STATE OF WISCONSIN)
) SS
COUNTY OF WAUKESHA)

FRED W. RISTOW being first duly sworn oath, deposes and states as follows:

1. That affiant is one of the plaintiffs in the above-entitled action and makes this Affidavit in opposition to a Motion To Dismiss brought by the defendant, South Carolina State Ports Authori-

ty.

2. That affiant was injured on the premises of the defendant, South Carolina State Ports Authority on December 20, 1988.

3. That affiant was accompanied to the hospital by a managerial employee of the defendant, South Carolina Ports Au thority. Also affiant was accompanied to the hospital on December 20, 1988 by Lee Pitillo, an Adjuster affiant believes is employed by Crawford and Company who was acting on behalf defendant, South Carolina State Ports Authority and its insurance carrier, Lloyds of London Insurance Company. Affiant was informed by Lee Pitillo that Lloyds of London was at all times material, the insurer for the defendant, South Carolina State Ports Authority.

4. That affiant was led to believe by said Lee Pitillo that affiant could settle his claim for damages arising out of the accident caused by the negligence of an employee of the defendant, Ports Authority, directly with said Lloyds of London by dealing with Lee Pitillo directly and without counsel.

5. That subsequently on or about July of 1990 Lee Pitillo and affiant agreed to a settlement of affiant's claim for Seventy-Five Thousand Dollars (75,000.00).

6. Despite repeated reassurances by Lee Pitillo, no settlement check arrived or was ever tendered to affiant prior to December, 1990.

7. In December, 1990 affiant consulted an attorney in Wisconsin who immediately advised affiant of potential Stat-

ute of Limitation problems and who made inquiry through Threshermen's Mutual insurance Company, the workman's compensation carrier as to the appropriate Statute of Limitations for personal injuries in South Carolina. Affiant's Wisconsin counsel was advised by David Williams, an Adjuster for Threshermen's Mutual Insurance Company, that South had a three (3) year Statute of Limitations and no filing requirements.

8. That affiant immediately retained counsel and changed his position to his detriment because of the breach of contract for settlement that Lloyds of London committed by not forwarding a settlement check within a reasonable time.

9. That affiant verily believes that affiant was intentionally or negligently strung along by Lee Pitillo and Lloyds

of London and that same were agents for the defendant, State Ports Authority.

10. That affiant verily believes that the defendant should be estopped from asserting forum or Statute of Limitation defenses because of the conduct described above.

/s/ Fred W. Ristow
Fred W. Ristow

Subscribed and sworn to before me
this 9th day of March 1992.

/s/ Gail A. Schulz
Notary Public, State of Wisconsin
My Commission expires March 28, 1993.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA,

CHARLESTON DIVISION

SAMUEL COAKLEY,

Plaintiff,

CIVIL ACTION NO. 2:87-1442-2

ORDER

VS.

SOUTH CAROLINA STATE PORTS AUTHORITY; W. DON WELCH, Executive Director, and HENRY TECKLENBURG, JR., H. DON MCELVEEN, ROBERT V. ROYALL, JR., JAMES B. MOORE, THEODORE GUERARD, ERNEST L. WILLIS, JOSEPH P. GRIFFITH, HARRY A. CHAPMAN, and THOMAS F. HARTNETT, Members of the Board of the South Carolina State Ports Authority,

Defendants.

Plaintiff is a former employee of the South Carolina State Ports Authority (SPA) and has brought this suit under 42 United States Code section 1983 challenging the constitutionality of his termination. Plaintiff seeks, inter

alia, reinstatement, back pay, and damages. The defendants are the SPA, its Executive Director, and members of the SPA Board of Directors as of June 1, 1987. The individual defendants are all sued in their official capacities only.

This matter comes before the court now on defendants' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A hearing was held on this matter in Charleston, South Carolina, on May 31, 1988. Defendants move to dismiss this action on the ground that SPA is an agency or alter ego of the State of South Carolina, and, therefore, is immune from suit in federal court under the protection of the Eleventh Amendment. Further, the individual defendants argue that they are also immune from suit because they are

being sued in their official capacities, which is actually just another way of suing the State, and, therefore, is barred by the Eleventh Amendment. The individual defendants also rely on the additional ground that they had no personal involvement in the alleged violation of plaintiff's rights, as is required to impose liability under section 1983, and, on its face, the complaint does not allege any personal involvement on their part.

Plaintiff argues that the SPA is not the alter ego or agency of the State and, consequently, is not entitled to Eleventh Amendment protection. Plaintiff further contends that even if the court finds the Eleventh Amendment does apply to the SPA, prospective equitable relief (i.e., reinstatement) can be granted

against the individual defendants under the teachings of Ex parte Young, 209 U.S. 123 (1908).1 Finally, plaintiff argues that defendants' contention that individual officials cannot be sued without a showing of personal involvement relies on cases involving damage claims against officials in their personal capacities whereas, here, defendants are being sued only in their official capacities and equitable relief is available against them under section 1983, regardless of whether the Eleventh Amendment bars plaintiff's claims for damages.

While the Fourth Circuit has recog-

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1 The basic doctrine of Ex parte Young is that a federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally.

nized that many factors must be considered in determining whether an entity is an alter ego or agency of the state, that court has specifically identified and discussed four principal factors.

> [I]t is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded. . . . We agree that this is a most important consideration for "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest." Ford Motor Co., 323 U.S. at 464, 65 S.Ct. at 350. Other important inquiries underlying our consideration of eleventh amendment immunity include, but are not necessarily limited to, whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law.

Ram Ditta v. Md. Nat. Capital Park & Planning Comm., 822 F.2d 456, 457-58 (4th Cir. 1987) (footnotes omitted).

In applying these factors to the SPA,

plaintiff first argues that the State Treasury is not responsible for the SPA's expenditures, as explicitly commanded by S.C. Code Ann. section 54-3-140(9) (1976). Plaintiff's Opposition to Defendants' Motion to Dismiss 7. That section reads in full:

> In order to enable it to carry out the purposes of this chapter, the Authority: [m]ay apply for and accept loans and grants of money from any Federal agency for purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or Ctaxing power of the State, or any political subdivision thereof; . . . . (emphasis added).

This section appears to be restricting the SPA with regards to loans and grants from a federal agency, however, there is nothing to indicate that this language is to be read any broader than that or as broad as plaintiff contends. To the contrary, the affidavit of the Chief Financial Officer of the SPA avers that the South Carolina General Assembly appropriated $750,000 for the initial operation of the SPA and made annual appropriations for its operations from 1942 to 1959. Affidavit of William M. Lawrence at Paragraphs 5, 10. Since 1959, the General Assembly has made annual appropriations to pay the principal and interest on general obligation bonds of the State issued to finance capital improvements for the SPA. Id. at Paragraph 6. The State has issued a total of

$105,644,834.30 worth of said bonds to finance SPA's capital improvements, and the proceeds of these bonds were deposited in the State Treasury and distributed to the SPA at the direction of the General Assembly. Id. at Paragraph 7. Although it appears that the operations of the SPA are now essentially self-sustaining,2 plaintiff has failed to establish clearly that the State would not ultimately be responsible for SPA's expenditures, including any judgment that might be awarded against it.

Another factor to consider under Ram

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2 All net earnings of SPA not needed for the operation of its business have been paid into the State Treasury and held subject to further action of the General Assembly; since its creation, SPA has paid a total of $1,552,880.62 of such net earnings into the State Treasury. Affidavit of William M. Lawrence at Paragraph 4.

Ditta is whether the entity exercises a significant degree of autonomy from the state. Plaintiff argues that the SPA has the power to sue and be sued, to make contracts, to acquire and dispose of real estate, and its budget is approved only by its own board, rather than the State Budget and Control Board. Plaintiff's Opposition to Defendants' Motion to Dismiss at 8.

On the other hand, SPA was created by statute as an "instrumentality of the State" for the purpose "[i]n general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State." S.C. Code Ann. Sec. 54-3-130(9). SPA is governed by a board whose members are appointed by the governor with the consent

of the Senate. Sec. 54-3-20. Its property is not subject to any taxes or assessments, Sec. 54-3-1050, and all net earnings "not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly." Sec. 54-3-1020. Further, the SPA has been given broad power of eminent domain "not only as to all property ofprivate persons or corporations but also as to property already devoted to public use." Sec. 54-3-150. Based on the foregoing, we are not persuaded that the SPA exercises a significant degree of autonomy from the State; although it appears that SPA enjoys a certain degree of independence, it is apparent that SPA is not significantly autonomous and shares to a great extent in the States's sovereignty.

A third consideration under Ram Ditta is whether the entity is involved with local versus statewide concerns. Here, it is clear that SPA operates and maintains South Carolina's ports for the benefit of the entire State3 and, consequently, it is primarily involved with statewide concerns.

The final Ram Ditta factor to consider is how the governmental entity is treat-

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3 See. e.g., 54-3-110. State may improve harbors and seaports through Authority.

Through the Authority the State may engage in promoting, developing, constructing, equipping, maintain and operating the harbors or seaports within the State, namely Charleston, Georgetown and Port Royal, and works of internal improvement incident thereto, including the acquisition or construction, maintenance and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

ed as a matter of state law.4 Neither party, however, cites South Carolina case law to support its position, and the court was unable to find any such cases on point. Plaintiff primarily relies upon a district court case from the Southern District of New York, Doris Trading Corp. v. S.S. Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y. 1976), and an opinion letter from the South Carolina-Attorney General's Office dated Dec-

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4 Although this is a consideration, the question of whether an entity is an agency or alter ego of the State is a question of federal, not state, law. Ram Ditta, 822 F.2d at 458 n.5 quoting Blake v. Kline, 612 F.2d 718, 722 (3rd Cir. 1979), cert. denied, 447 U.S. 921 (1980).

ember 8, 1987.5 Plaintiff acknowledges, though, that federal district courts in the District of South Carolina have consistently held that the SPA is protected by the Eleventh Amendment, and defendants rely, inter alia, on such cases,

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5 The SPA had instituted an executive incentive pay plan whereby its top executives would receive additional compensation based upon the SPA's annual income and the executives annual salaries. The SPA Board asked the Attorney General's Office for its opinion as to the constitutionality of said practice. In its letter of December 8, 1987 to SPA Board member Thomas F. Hartnett, the Attorney General's Office concluded:

> that the executive incentive pay plan adopted by the governing body of the South Carolina State Ports Authority would probably not be violative of Article 556, Section 30 of the State Constitution or Section 8-15-10 of the Code because the extra compensation would be for services to be rendered in the future by Authority employees who would probably not be considered to be state employees.

e.g. South Carolina State Ports Authority v. Seaboard Air Line Railroad Co., 124 F. Supp. 533 (E.D.S.C. 1954). Of course, none of the authorities cited by either party is binding on this court and, further, they do not evidence how the SPA is treated by the South Carolina state courts.

Although a state court's view of the status-of a governmental entity is a factor for a federal court to consider under the Ram Ditta guideline, questions of Eleventh Amendment immunity are ultimately governed by federal law, Ram Ditta, 822 F.2d at 460, and, consequently, this particular factor is probably the least important one in the alter ego equation. For example, in Ram Ditta the Court of Appeals of Maryland had held that the governmental entity in question

in that case was a state agency and, in turn, the district court relied heavily on that state court's decision in finding that the park' commission was entitled to Eleventh Amendment immunity. On appeal, the Fourth Circuit reversed and concluded that the park commission was not the alter ego of the state because the other three factors, i.e., the state treasury's responsibility for any judgment, the commission's autonomy from the state, and the nature of the commission's functions, all weighed heavily against Eleventh Amendment immunity. Id.

Similarly, in the instant case, our inquiry must go beyond that single f actor of how the SPA may be treated by the state courts and consider "all factors bearing on the federal policy entitling appropriate governmental entities to

eleventh amendment immunity. Id. Balancing all of these criteria, we conclude that the SPA is an agency of the State of South Carolina and, accordingly, is entitled to Eleventh Amendment immunity. Consequently, defendants' motion to dismiss this action as to defendant SPA must be granted.

We are still left to consider defendants' motion as to the individual defendants sued only in their official capacities. Plaintiff has already acknowledged that if the court finds that SPA is protected by the Eleventh Amendment, as we have found, then plaintiff could not recover damages against these individual defendants in their official capacities, since such an award would be tantamount to a judgment against the State and, therefore also prohibited by

the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) (plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself), see also, McConnell v. Adams, 829 F.2d 1319, 1329 (4th Cir. 1987). Consequently, the issue remaining as to the individual defendants is whether this suit can be maintained against them only for the prospective relief of reinstatement.

Plaintiff argues that even where a state agency is immune from suit under the Eleventh Amendment, it has been clear since Ex parte Young, 209 U.S. 123 (1908), that prospective equitable relief can be granted against state officials for violations of the United States Constitution. In this case,

plaintiff alleges violations of the Due Process Clause of the Fourteenth Amendment, and thus contends that a suit for a prospective injunction, viz. reinstatement, lies against the individual members of the SPA Board and its executive director in their official capacities.

The holding in Ex parte Young was that a suit challenging the constitutionality of a state officials action is not one against the state in that case, a federal court enjoined the Attorney General of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment, and the Supreme Court held that the Eleventh Amendment did not prohibit issuance of the injunction. The decision in Young was based on the theory that an uncon

stitutional enactment is void and, therefore, does not "impart to him [the officer] any immunity from responsibility to the supreme authority. of the United States." Id. at 160. Further, since the state could not authorize the action, the officer was "stripped of his official or representative character and subjected in his person to the consequences of his individual conduct." Id.

Not all forms of injunctive relief against state officials are available under the Young doctrine, though, because of the bar of the Eleventh Amendment. Consequently, in Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that when a plaintiff sues a state official alleging a violation of federal law, the federal court could award an injunction that governs the of-

ficials future conduct, but not one that awards retroactive monetary relief. The court explained the distinction, as follows:

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between day and night. The injunction issued in Ex parte Young was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in Ex parte Young. . . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancil-

> lary effect on the state treasury is a permissible and often an inevitable to consequence of the principle announced in Ex parte Young, supra.
> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation. . . . While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State.

Id. at 667-68.

The Young doctrine was recently illustrated in the Fourth Circuit case of McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987). In that case, employees of two Virginia county electoral boards were terminated, and they sued the electoral board members and general county registrar under section 1983 for dam-

ages and for an injunction to reinstate them. The Court of Appeals held that said defendants were acting as state employees and, consequently, the district court erred in awarding damages against them in their official capacities because they were protected by the Eleventh Amendment. Id. at 1329. These defendants were not protected from injunctive relief under the Eleventh Amendment, however, because of the doctrine of Ex parte Young.

> The appellants' actions in failing to rehire the appellees violated the appellees' rights guaranteed by the first and fourteenth amendments. The decision of the district court finding. such a violation is accordingly affirmed. Since the state's eleventh amendment immunity does not protect it from suits for injunctive relief governing its officials' future conduct, the order of the district court requiring the appellants to rehire the appellees is also affirmed. Ex parte Young, 209 U.S.

123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)

Id. at 1329-30.

Based on the foregoing, we agree with plaintiff's position in the instant case, that if he can prove the individual defendants sued in their official capacities violated his federal constitutional rights, plaintiff would be entitled to seek prospective injunctive relief against said defendants. Defendants contend, however, that plaintiff will be unable to prove liability against them under section 1983 because plaintiff cannot show that they were personally involved in the alleged deprivation of plaintiff's rights, and, in fact, the complaint fails even to allege any personal involvement on their part. Further, defendants argue that since section 1983 will not support a claim based

on a respondeat superior theory of liability, see Monell v. Dep't. of Social Services of City of New York, 436 U.S. 658 (1978), plaintiff's complaint fails to state a cause of action against them, and the individual defendants should be dismissed. Plaintiff agrees with defendants that officials cannot be sued under section 1983 without a showing that they were personally responsible for plaintiff's injury when the plaintiff is seeking damages, but he argues that personal involvement is not a requirement under section 1983 when the relief sought against the defendants is a prospective injunction. Plaintiff cites no authority for this position.

In considering a motion to dismiss, a complaint must be construed in the light most favorable to the plaintiff and its

allegations are taken as true. 5 C. Wright A. Miller, Federal Practice and Procedure, Sec. 1357 at 594. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Cruz v. Beto, 405 U.S. 319, 322 (1972), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

As the defendants contend, the complaint in this case does not allege personal involvement by the individual defendants. The complaint does allege, however, that said defendants have "ultimate supervisory responsibility for SPA operations," Complaint Paragraph 5, and it is well-established in the Fourth Circuit that under section 1983 "super-

visory officials may be liable in certain circumstances for the constitutional injuries inflicted by their subordinates." Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984); see also Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980), cert. denied, 450 U.S. 929 (1981). Liability in this context is not based on respondeat superior, "but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict ..." Id. Supervisory liability in this context may extend to the highest levels of state government. Id. at 373. "The outer limits of liability in any given case are determined ultimately by pinpointing the persons in the decisionmaking chain whose deliberate indif-

ference permitted the constitutional abuses to continue unchecked." Id. Consequently, this determination of liability generally turns on the facts and not law. Id.; see also Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981).

Turning to the facts here, according to Paragraph 5 of plaintiff's complaint, defendants Willis, Hartnett, and Guerard were not members of the SPA Board at the time of the events alleged in the complaint. Consequently, said defendants could not be persons in the decisionmaking chain whose supervisory indifference may have been a causative factor in the constitutional injuries allegedly inflicted on plaintiff. On the other hand, defendants Tecklenburg, McElveen, Royall, Moore, Griffith, and Chapman were

members of the board at the time of said events and Welch was SPA's executive director; accordingly, these defendants' supervisory indifference could have been a causative factor in this case.

The plaintiff must meet a heavy burden of proof in supervisory liability cases and, ordinarily, it cannot be satisfied by pointing to a single incident or isolated incidents. Slakan, 737 F.2d at 373. Still, in considering this complaint in the light most favorable to the plaintiff, it does not appear to us beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to the equitable relief requested. Cruz v. Beto, 405 U.S. at 322. Consequently, we must deny the individual defendants' motion to dismiss as to defendants Welch, Tecklenburg,

McElveen, Royall, Moore, Griffith, and Chapman. Said motion is granted, however, as to the defendants who were not members of the board at the time of the alleged events, viz., as to defendants Willis, Hartnett, and Guerard.

In summary, defendant SPA's motion to dismiss is granted because it is an agency of the State and, therefore, entitled to Eleventh Amendment protection. Similarly, the Eleventh Amendment protects the individual defendants sued in their official capacities from an award for damages. Plaintiff may, however, maintain its suit against the individual defendants Welch, Tecklenburg, McElveen, Royall, Moore, Griffith, and, Chapman for the prospective relief of reinstatement. Defendants Willis, Hartnett, and Guerard are dismissed from the case be-

cause plaintiff could not possibly prove supervisory liability against them under section 1983, since they were not members of the board at the time of the alleged events.

AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

DATED:

At Florence, South Carolina

July 15, 1988.